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JAMES R. BROWNING

IN THE

Supreme Court of the United States

October Term, 1960.

No. 489

MONOLITH PORTLAND MIDWEST COMPANY, a corporation,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOSEPH T. ENRIGHT
NORMAN ELLIOTT
BILL B. BUZ
541 South Spring Street
Los Angeles 13, California

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Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

Opinions Below.

The District Court did not file an opinion. The opinion of the Court of Appeals [R. 418, Appendix "A", *infra* pp. 1-14] has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 27, 1960. [R. 430.] Rehearing was denied without opinion on August 30, 1960. [R. 429.] The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented.

Whether an action by a World War II contractor against the Reconstruction Finance Corporation for the "fair compensation" pledged by the Contract Settlement Act of 1944 for the premature cancellation of such contracts abated under the rule of *Defense Supplies Corporation v. Lawrence Warehouse Co.*, 336 U. S. 631, for non-substitution of R. F. C.'s successor as a defendant; where, unlike the Joint Resolution considered in *Defense Supplies Corporation*, which both dissolved the D. S. C. and concurrently required substitution, the Reorganization Plan No. 1 of 1957, which "abolished" the R. F. C., contained no such substitution requirement and the abatement is based on the incorporation by implication of a prior uncodified provision requiring substitution following "dissolution" in the Reconstruction Finance Corporation Liquidation Act of 1953, a statute enumerating certain conditions precedent to "dissolution," some of which never occurred; or, whether the incorporation by implication of such prior, discrete statute, the non-occurrence of several of the very conditions Congress specified as precedent to "dissolution," the facts tending to show an estoppel against the Government, the character of an action for "fair compensation" for contracts terminated at the Government's convenience, and the existence of California and District of Columbia statutes providing for non-abatement of pending actions against "dissolved" corporations, preclude such abatement, in light of the notice element of due process under the Fifth Amendment.

Statutes Involved.

The pertinent provisions of the following statutes are set out in chronological order in Appendix "B", *infra*, pages 16-31:

1. *The Reconstruction Finance Corporation Act of* 1932, as amended, c. 166, 61 Stat. 202, 208, c. 334 §3, 62 Stat. 362, 15 U. S. C. A. §§603, 608, 609 (Appendix "B", p. 16);
2. *Joint Resolution Dissolving Defense Plant Corporation and Substituting Reconstruction Finance Corporation*, 59 Stat. 310, c. 215, June 30, 1945 (Appendix "B", p. 17);
3. *The Contract Settlement Act of* 1944, c. 358, 58 Stat. 649; 41 U. S. C. A. Section 101 *et seq.* (Appendix "B", p. 18);
4. *War Mobilization and Reconversion Act of* 1944, 58 Stat. 785, 50 U. S. C. A. Appendix, §1657 (Appendix "B", p. 23);
5. *The Reconstruction Finance Corporation Liquidation Act of* 1953, c. 282, 67 Stat. 231 (Appendix "B", p. 24);
6. *The Reconstruction Finance Corporation Act of* 1954, c. 410, 68 Stat. 320 (Appendix "B", p. 25);
7. *The Reorganization Plan No.* 1 of 1957, 22 F. R. 4633, 71 Stat. 647, 15 U. S. C. A. 1959 Supp. §601, p. 27 (Appendix "B", p. 27);
8. *California Corporations Code*, Section 5401 (Appendix "B", p. 30);
9. *Code of District of Columbia*, §29-716 [5:406], §29-931 (Appendix "B", p. 30);
10. *Wyoming Compiled Statutes*, 1945, §44-1103 (Appendix "B", p. 31).

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3. *The Contract Settlement Act of* 1944, c. 358, 58 Stat. 649; 41 U. S. C. A. Section 101 *et seq.* (Appendix "B", p. 18);
4. *War Mobilization and Reconversion Act of* 1944, 58 Stat. 785, 50 U. S. C. A. Appendix, §1657 (Appendix "B", p. 23);
5. *The Reconstruction Finance Corporation Liquidation Act of* 1953, c. 282, 67 Stat. 231 (Appendix "B", p. 24);
6. *The Reconstruction Finance Corporation Act of* 1954, c. 410, 68 Stat. 320 (Appendix "B", p. 25);
7. *The Reorganization Plan No.* 1 of 1957, 22 F. R. 4633, 71 Stat. 647, 15 U. S. C. A. 1959 Supp. §601, p. 27 (Appendix "B", p. 27);
8. *California Corporations Code*, Section 5401 (Appendix "B", p. 30);
9. *Code of District of Columbia*, §29-716 [5:406], §29-931 (Appendix "B", p. 30);
10. *Wyoming Compiled Statutes*, 1945, §44-1103 (Appendix "B", p. 31).

Statement.

Petitioner made a contract with Defense Plant Corporation in 1943 for the construction and operation of an alumina[1] plant on land adjacent to petitioner's cement plant in Laramie, Wyoming deeded to Defense Supplies Corporation by the petitioner. The motivation for the contract was the mutual desire of petitioner and the United States Government to determine the feasibility of commercially extracting alumina from native ores by a process developed by petitioner. In 1946, when the plant was almost complete, the Reconstruction Finance Corporation, the successor of Defense Plant Corporation,[2] terminated the contract for the convenience of the Government, pursuant to the War Mobilization and Reconversion Act of 1944, 58 Stat. 785 (Appendix "B", p. 23), with the specific (but undisclosed) purpose "to hold the plant for Bureau of Mines operation" to test the Monolith process [Ex. B-F].

Petitioner then brought an action against R. F. C. to enjoin the cannibalization of the plant, for its expenses incurred, compensation for such termination, and an opportunity to operate the plant. The District Court dismissed [R. 89-90] on the ground that the Reconversion Act applied retroactively to contracts executed prior to its enactment; the termination was therefore lawful; and petitioner had not exhausted its administrative remedy to obtain the "fair compensation" provided for such a termination by the Contract Settlement Act of 1944, 58 Stat.

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[1]Alumina is aluminum oxide from which the metal, aluminum is extracted.

[2]In 1945, Congress dissolved Defense Plant Corporation and respondent assumed Defense Plant Corporation's liabilities. Joint Resolution (Public Law 109) of June 30, 1945, c. 215, 59 Stat. 310.

649 (Appendix "B", p. 18). The Court also held that petitioner had no right to purchase the plant under an option provision of the contract [R. 59].

The judgment of dismissal was affirmed by the Court of Appeals and certiorari was denied. *Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 178 F. 2d 854, 9th Cir. 1949, cer. den. 339 U. S. 932 (1950), reh. den. 339 U. S. 954 (1950).

Petitioner filed a termination claim with R. F. C., which issued Findings on June 7, 1950, [Ex. N, R. 134] adverse to petitioner, holding that petitioner was indebted to R. F. C. for damages allegedly incurred by being restrained by injunction from disposing of the plant.

Thereafter, petitioner seasonably filed its complaint herein [R. 7]. On R. F. C.'s motion, the District Court struck all allegations of general damage and held that petitioner's only right was to "fair compensation" under the Contract Settlement Act. *Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 95 F. Supp. 570, 1951. Subsequently, the Court denied petitioner's request for jury trial. *Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 102 F. Supp. 951, 1952.

After R. F. C. obtained possession in 1950, it reported the plant as excess to its needs [Ex. BA, BB]. Thereafter, the plant was deeded to the United States [Ex. BC], which placed the Bureau of Mines in possession and made appropriations for the purpose of operating the plant using petitioner's process [T. 3644-3648; Ex. 21, 21-A, 102, 102-A]. The Bureau of Mines was operating the plant at the time of trial, using petitioner's process [T. 3666-3696].

Two years after the trial to the Court (November 5, 1952—February 20, 1953), the Court made Findings of Fact and Conclusions of Law [R. 246-312], adverse to petitioner, and rendered an opinion. *Monolith Portland Midwest Company v. Reconstruction Finance Corporation,* 128 F. Supp. 824, 1955.)

On appeal, the Court of Appeals reversed, and remanded to the District Court for a new trial by jury. *Monolith Portland Midwest Company v. Reconstruction Finance Corporation,* 240 F. 2d 444, 9th Cir. 1957, cer. den. 354 U. S. 921 (1957).

While the appeal was pending the Laramie alumina plant (immediately adjacent to petitioner's cement plant) was sold to the Ideal Cement Company, one of the largest cement chains in America, and petitioner's direct competitor in the Rocky Mountain area.[3]

Although the case was returned to the original District Judge on November 21, 1957, it was not brought on for trial due to the Court's heavy calendar despite repeated requests by petitioner's counsel [Affidavit of Joseph T. Enright, R. 363].

Petitioner's action for "fair compensation" under the Contract Settlement Act was dismissed by the District Court on April 8, 1959, on the ground that such action had abated for non-substitution of R. F. C.'s successor—the General Services Administrator—within twelve

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[3]H. of R. Report of Hearing 84th Congress 1st Session on "Negotiated Sale of a Government-Owned Defense Plant near Laramie, Wyoming".

months after Congress "abolished" the R. F. C. by the Reorganization Plan No. 1 of 1957, 71 Stat. 647 (Appendix "B", p. 27). The Court concluded that abatement had occurred [R. 307], because, although the Reorganization Plan itself did not require substitution, an earlier uncodified statute, the Reconstruction Finance Corporation Liquidation Act of 1953, as amended, 67 Stat. 231, 68 Stat. 320 (Appendix "B", p. 24), did contain a provision requiring timely substitution upon R. F. C.'s "dissolution."

Although the Reorganization Plan No. 1 of 1957 did not refer to the Liquidation Act, and although all of the acts specified by Congress in the Liquidation Act as conditions precedent to the "dissolution" of R. F. C. (*e.g.*, the filing of a "final report") had admittedly not occurred, the District Court held that the "abolition" of R. F. C. pursuant to Reorganization Plan No. 1 of 1957 effected a "dissolution" of R. F. C. within the meaning of the Liquidation Act, and that petitioner's motion to substitute the Administrator, filed March 2, 1959, was untimely and the action therefore abated as of the close of June 30, 1958, twelve months after R. F. C. was "abolished."

The Court also held that petitioner's unsuccessful attempts to obtain the name of R. F. C.'s lawful successor from R. F. C. and its attorneys in the period 1955-1956, so that an appropriate substitution could be made [R. 348-357, 363-365], were legally insufficient to establish an estoppel, and that, in any event, an estoppel would not lie against the Government [R. 397-398].

The Court of Appeals affirmed (Appendix "A", *infra*, pp. 1-14).

Reasons for Granting the Writ.

1. The decision of the Court of Appeals unreasonably extends the holding in *Defense Supplies Corporation* to cases where Congress has not clearly required substitution of the successors of federal corporations as parties and where the harsh rule of abatement forecloses a war contractor's statutory and constitutional right to fair and just compensation for the cancellation of his contract for the convenience of the Government. This case thus presents the important question of statutory and constitutional construction not reached by *Defense Supplies Corporation, i.e.* what is the minimum permissible notice of prospective abatement for non-substitution of federal corporations as parties under the due process requirement of the Fifth Amendment.

The Courts below have held that abatement could with propriety be based upon the incorporation by implication in the abolition statute of a requirement of substitution in an earlier, uncodified, discrete statute, not referred to in the statute which abolished the federal business corporation in question. The admitted non-occurrence of the conditions Congress specified as precedent to such mandatory substitution is brushed aside as having been cured by the corporation's abolition. In effect, the Court has held that the historical element of notice as part of due process does not apply in such situations, and that persons dealing with such corporations must rightly construe ambiguous forfeiture statutes at their peril.

The single Joint Resolution of Congress the Court considered in *Defense Supplies Corporation*[4] did two things:

1. It declared the D. S. C. to be "dissolved"; and

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[4] 59 Stat. 310, c. 215, June 30, 1945 (Appendix "B", p. 17).

2. It provided for non-abatement if substitution of R. F. C. for D. S. C. was made within twelve months.

In this case, the terminal statute—the Reorganization Plan No. 1 of 1957[5]—neither "dissolves" the R. F. C. or refers to non-abatement and/or substitution. Such provision, which Congress specifically prescribed concurrently with D. S. C.'s "dissolution" in *Defense Supplies Corporation*, must be read into the Reorganization Plan No. 1 of 1957 by implication from an uncodified portion of the Reconstruction Finance Corporation Liquidation Act of 1953.[6]

The Reconstruction Finance Corporation Liquidation Act of 1953 amended the R. F. C. Act of 1932[7] in certain particulars looking toward R. F. C.'s winding up. Such amendments were added to Title 15, §601 *et seq.* as part of R. F. C.'s organic law. Section 105 of such Liquidation Act provided for substitution of R. F. C.'s successor within twelve months of R. F. C.'s "termination of succession." This provision was not added to the R. F. C. Act in the United States Code, but lay dormant in the Statutes at Large.

In 1954, Congress further amended the R. F. C. Act of 1932 by the Reconstruction Finance Corporation Act of 1954,[8] which also amended the words "termination of succession" in uncodified Section 105 of the Liquidation Act to read "dissolution". By its amendment of the R. F. C. Act of 1932 (15 U. S. C. A. §§603(a), 609)

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[5]71 Stat. 647, June 30, 1957, 22 F. R. 4633 (Appendix "B", p. 27).

[6]67 Stat. 231, c. 282, July 30, 1953 (Appendix "B", p. 24).

[7]47 Stat. 5, c. 8, January 22, 1932 (Appendix "B", p. 16).

[8]68 Stat. 320, c. 410, June 29, 1954 (Appendix "B", p. 24).

Congress provided that R. F. C. should have succession until it was "dissolved" and that R. F. C. should be "dissolved" only when certain things had been done. Among these conditions precedent to dissolution was the requirement of a "final report to Congress."

It is undisputed that such "final report" had not been made to Congress at the time the District Court below entered its judgment of dismissal. It was not made until May 6, 1959. Copies of such report were tendered to the Court of Appeals on oral argument [R. 415]. However, the Court below reasoned that the conditions precedent to "dissolution" provided in 15 U. S. C. A. §609 were completely superseded by the Reorganization Plan No. 1 of 1957, but that the uncodified provision for abatement for non-substitution on such "dissolution" was not so superseded (Appendix "A", p. 10).

In reaching its necessarily involved statutory construction by implication the Court ignored President Eisenhower's Message to Congress transmitting the Reorganization Plan No. 1 of 1957, which read in part as follows:[9]

> "*The Plan also . . . by operation of law substitutes the particular transferee for the Corporation* . . . To the extent that it becomes necessary or desirable, therefore, the transferees will be enabled, with respect to the transferred functions, to sue and be sued. . . ." (Emphasis added.)

Analysis of the basic nature and purpose of the notice requirement of due process shows that a person confronted by a threatened forfeiture of his right to fair and just compensation is entitled to a high degree of

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[9]1957 U. S. Code Cong. & Admin. News, pp. 951-952.

explicitness and clarity in the statute which accomplishes the forfeiture.

United States v. Fine Gambling Devices, 346 U. S. 441 (1953);

Sinclair v. United States, 279 U. S. 263.

As the Court said in *Becker Steel Co. v. Cummings*, 296 U. S. 74, 80 L. Ed. 54 (1935): (p. 80)

> "... Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. . . ."

Appellant submits that no such compelling language can be found here when all the statutes involved and the President's Message are laid side by side.

Applying settled principles of statutory and constitutional interpretation to the instant case, appellant submits that any asserted implied statutory requirement of substitution in Section 6(c) of Reorganization Plan No. 1 of 1957 is ambiguous and would work a forfeiture violative of due process, contrary to the declared policy of reasonable construction to avoid constitutional doubts.

Facing up to the broader issue imbedded in this appeal requires recognition of the grave possibility that the Court's construction of the Reorganization Plan No. 1 of 1957, authorized by Congress as an administrative expedient, could frustrate the solemnly declared purpose of Congress to provide fair compensation to contractors whose contracts were cancelled for the Government's convenience.

Naturally, the most serious deference is due to legislative intention evidenced by statutory phraseology. But the question travels far beyond a bare question of statu-

tory interpretation. This problem could be restructured and treated as a question involving Congressional intent to immunize its business corporations from the application of the Fifth Amendment, following the receipt and enjoyment of the benefits of a particular transaction.

2. In holding that an action against a federal corporation automatically abates upon its dissolution barring specific *federal* statutory authorization for continuance of litigation against its successor [R. 422], the Court of Appeals has turned its back on thirty years of steady development in the law of such corporations (See *National City Bank v. Republic of China*, 348 U. S. 356, 360.)

This Court did not reach such important question in *Defense Supplies Corporation*, since the Joint Resolution which dissolved the D. S. C. simultaneously provided for abatement upon nonsubstitution. The Court did state that the dissolution of a corporation works an abatement of pending actions, adding, however, the modern relaxation of the harsh common law rule: (336 U. S. 631, 634-635)

> "But a time-honored feature of the corporate device is that a corporation may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing . . ."

The cases relied upon by the Court involved private corporations and statutes of Oklahoma and Texas, providing for continuation of litigation after dissolution.

The question of whether Congress intended to immunize a federal corporation doing business within a State from a statute of such State providing for nonabatement of litigation upon dissolution has never been decided by this Court.

By their original contract, executed in California, the parties agreed that: [R. 48]

> "3. This Agreement shall be interpreted and construed in accordance with the laws of the State of California."

Congress directed that actions against R. F. C. for "fair compensation" could be brought "in any court of competent jurisdiction in accordance with existing law." (41 U. S. C. A. §113(b)(2), Appendix "B", p. 21). The contract was performed partially in California and partially in Wyoming. The action was brought in California.

Section 5401 of the California Corporations Code at all relevant times herein provided:

> "No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for dissolution or winding up."

It is of interest that the harsh old common law of abatement on corporate dissolution is not followed today in any American jurisprudence. (8 *Thompson on Corporations*, 717 (3rd Ed. 1927).) §6530. (See also: *ABC Brewing Corporation v. Commissioner*, 224 F. 2d 483 (9th Cir. 1955). For example, the statutes of District of Columbia, situs of R. F. C.'s domicile, provide for non-abatement on dissolution (District of Columbia Code, §29-716 [5:406], §29-931), as do the statutes of Wyoming (Wyoming Compiled Statutes, 1945, §44-1103). The Wyoming statute also requires a foreign corporation doing business in Wyoming to file and publish notice of dissolution (Wyoming Compiled Statutes 1945, 44-1110).

Petitioner respectfully submits that in the absence of a clear direction in the Reorganization Plan No. 1 of 1957 that actions for fair compensation should abate upon the "abolition" of R. F. C. it is appropriate to turn to California law to resolve this question in accordance with "existing law." (*United States v. Standard Oil Co.*, 332 U. S. 301, 308 (1947); *De Sylvia v. Ballentine*, 351 U. S. 570, 580 (1956); *Reconstruction Finance Corporation v. Beaver County*, 328 U. S. 204 (1946).) Such California law of non-abatement on corporate dissolution furnishes a convenient solution in no way inconsistent with protection of the federal interests, but rather in harmony with the exception provided in *Defense Supplies Corporation*, and with concepts of basic fairness and justice.

This Court considered another comparable facet of the interplay of state and federal law regarding the effect of corporate dissolution in *Melrose Distillers, Inc. v. United States*,[10] 359 U. S. 271, and struck at the heart of the matter when it stated: (359 U. S. 271, 274)

> "Policy reasons look to the same result. Petitioners were wholly owned subsidiaries of Schenley Industries, Inc. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalities than damages in civil suits. . . ."

So, too, in this case policy reasons point to survival of R. F. C. for the purpose of substituting its successor or transferee, the Administrator. Otherwise the Government would be unjustly enriched, for R. F. C.'s assets were merely transferred to other government instrumentalities.

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[10]See also decision below: 258 F. 2d 726 (4th Cir. 1958).

3. The Court declined to pass on the question of estoppel to urge abatement in the *Defense Supplies Corporation* case (336 U. S. 631, 640). Although some cases have held that estoppel would not prevent abatement *cf. Snyder v. Buck*, 340 U. S. 15, 19 (1950), the statutes there involved were clear and explicit as to the necessity of substitution, and such cases involved officers of the Executive Branch of the Government, acting in their official capacity. The distinction observed in other contexts between federal business corporations and the Executive Branch has equal validity here. (*Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381 (1939); *Federal Housing Authority v. Burr*, 309 U. S. 242, 244; *Reconstruction Finance Corporation v. J. G. Menihan Corporation*, 312 U. S. 81, 83 (1941).) As observed in *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380, 387-388 (1947):

> ". . . there is no reason why the square corners should constitute a one-way street."

As the record shows [R. 348-357, 363-365], petitioner has not slept on a stale claim but rather unsuccessfully attempted to ascertain the name of R. F. C.'s successor for the purpose of substitution.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

October 14, 1960.

Respectfully submitted,

JOSEPH T. ENRIGHT
NORMAN ELLIOTT
BILL B. BETZ
By NORMAN ELLIOTT,
Attorneys for Petitioner.

APPENDICES

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Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOSEPH T. ENRIGHT
NORMAN ELLIOTT
BILL B. BEAZ
541 South Spring Street,
Los Angeles 13, California,
Attorneys for Petitioner.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

Monolith Portland Midwest Company, a corporation, Appellant, vs. Reconstruction Finance Corporation, a corporation, Appellee.

No. 16,535. July 27, 1960.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Hamley and Hamlin, Circuit Judges

Hamley, Circuit Judge:

Monolith Portland Midwest Company instituted this suit against Reconstruction Finance Corporation on June 16, 1950. The purpose of the suit is to recover damages because of the termination by R. F. C. of a war contract which had been entered into by Monolith and Defense Plant Corporation, then a subsidiary of R. F. C.[1] On a previous appeal we vacated a judgment entered in favor of R. F. C. and remanded with instructions to grant a jury trial.[2]

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[1]The contract was entered into on June 28, 1943. Defense Plant Corporation was thereafter succeeded by R.F.C. The contract was terminated by R.F.C. on September 10, 1946, pursuant to the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U.S.C.A., Appendix, §§ 1651-1678. The present action was brought pursuant to § 13(b)(2) of the Contract Settlement Act of 1944, 58 Stat. 649, 661, 41 U.S.C.A. § 113(b).

[2]Monolith Portland Midwest Co. v. Reconstruction Finance Corporation, 128 F.Supp. 824, 240 F.2d 444, cert. denied June 17, 1957, 354 U. S. 921. The new trial, however, was limited to Monolith's claim for "reimbursables," this court sustaining the district court judgment in so far as it rejected Monolith's other claims. Prior litigation involving the same claim has also been before this court. Monolith Portland Midwest Co. v. Reconstruction Finance Corporation, 9 Cir., 178 F.2d 854.

The mandate of this court following the previous appeal was filed in the district court on November 18, 1957. On January 19, 1959, before the case had come on for a jury trial, the Administrator of General Services moved to dismiss the action. This motion was made on the ground that the action had abated by reason of the failure to substitute the Administrator of General Services in place of R. F. C. within one year following the effective date of Reorganization Plan No. 1 of 1957.[3] On March 2, 1959, Monolith countered with a motion to substitute the Administrator as defendant in place of R. F. C.

The district court granted R. F. C.'s motion and denied that of Monolith. Findings of fact, conclusions of law and a judgment dismissing the action were thereupon entered.[4] Monolith appeals.

The single question presented here is whether the action abated by reason of the failure to substitute the Administrator in place of R. F. C. within one year following the effective date of Reorganization Plan No. 1 of 1957.

R. F. C. came into existence in 1932 with the enactment of the Reconstruction Finance Corporation Act, approved January 22, 1932, Public Law 2—72d Cong., 47 Stat. 5-12. Succession of the corporation was originally

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[3]Reorganization Plan No. 1 of 1957 is set out in full in 22 F. R. 4633, 71 Stat. 647, and 15 U.S.C.A., 1959 Pocket Part § 601, p. 29.

[4]The effect of the judgment is not only to preclude Monolith from seeking a larger award than the $122,529.00 for "reimbursables" allowed at the first trial, but also to require R. F. C. to forego the net award in its favor in the sum of $42,361.87, as determined at the first trial, this net award having resulted from the deduction of Monolith's award from a gross award of $165,800.90 made to R. F. C. on its counterclaim.

established at ten years, but the act was amended from time to time to extend its succession. Beginning in the late 1940's the act was also amended several times to make provision for the liquidation of the corporation's assets and the winding up of its affairs.[5]

The original act as thus amended to June 29, 1954, contained certain provisions pertinent to our present inquiry, as set out in the margin.[6] In addition the Reconstruction Finance Corporation Liquidation Act, as amended to June 29, 1954, contained certain provisions

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[5]See Act of June 30, 1947, Title I § 1, Title II § 206(a), 61 Stat. 202, 208; Act of May 25, 1948, c. 334, § 3, 62 Stat. 362; Reorganization Plan No. 1 of 1951, 16 F. R. 3690, 65 Stat. 773, 15 U.S.C.A. § 604, 1959 Supp.; Reconstruction Finance Corporation Liquidation Act, approved July 30, 1953, 67 Stat. 230-231, §§ 102, 105, 106; and Reconstruction Finance Corporation Act of 1954, 68 Stat. 320, § 2.

[6]Section 3(a), 15 U.S.C.A. § 603(a):

"The Corporation shall have succession until it is dissolved pursuant to the provisions of section 10 (15 U.S.C.A. § 609) of this Act. . . ."

Section 10, 15 U.S.C.A. § 609:

"If by the close of business on June 30, 1954, its board of directors shall not have completed the liquidation of its assets and the winding up of its affairs, the duty of completing such liquidation and winding up of its affairs shall be transferred to the Secretary of the Treasury, who for such purpose, shall succeed to all the powers and duties of the board of directors under this chapter. In such event he may assign to any officer or officers of the United States in the Treasury Department the exercise and performance, under his general supervision and direction, of any such powers and duties. When the Secretary of the Treasury shall find that such liquidation will no longer be advantageous to the United States and that all of the Corporation's legal obligations have been provided for, he shall retire any capital stock then outstanding, pay into the Treasury as miscellaneous receipts the unused balance of the moneys belonging to the Corporation, and make a final report to Congress. Thereupon the Corporation shall be deemed to be dissolved."

relative to the abatement of actions by or against R. F. C. and the making of a report to Congress, as also quoted in the margin.[7]

Three years later, on June 30, 1957, Reorganization Plan No. 1 of 1957 relating to R. F. C. became effective. Under section 6 of this plan, quoted below, R. F. C. was "abolished."[8] Neither this plan nor any legislation made any express amendment of sections 105 and 106 of the Reconstruction Finance Corporation Liqui-

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[7]"Sec. 105. No suit, action, or other proceeding lawfully commenced by or against the Reconstruction Finance Corporation shall abate by reason of the dissolution of the Corporation; but the Court may, on motion or supplemental petition filed at any time within twelve months after the date of such dissolution and showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the officer or agency of the Government performing the functions with respect to which any suit, action, or other proceeding was commenced."

"Sec. 106. (a) Promptly after June 30, 1954, the Administrator of the Reconstruction Finance Corporation shall make a full report to the Congress."

[8]Section 6 of Reorganization Plan No. 1 of 1957 reads as follows:

"Sec. 6. Abolition of the Corporation.

"(a) The Corporation is hereby abolished.

"(b) The Secretary of the Treasury shall retire the capital stock of the Corporation and, subject to the provisions of section 4 hereof, shall pay into the Treasury, as miscellaneous receipts, all unused funds of the Corporation.

"(c) Not later than June 30, 1959, the Secretary of the Treasury shall transmit a report to the Congress, which report (1) shall cover the affairs of the Corporation up to the time of the taking effect of the provisions of this reorganization plan, and (2) shall correspond to the final report required by section 10 of the Reconstruction Finance Corporation Act, as amended (15 U.S.C. 609) [section 609 of this title]. The function of making the final report provided for in the said section 10 [section 609 of this title] is hereby abolished."

dation Act as it existed on June 29, 1954, and as quoted in footnote 7.

The judgment dismissing the action as abated is based on the view that the abolishment of R. F. C. on June 30, 1957, as accomplished by section 6 of Reorganization Plan No. 1 of 1957, amounted to a "dissolution" of R. F. C. within the meaning of section 105 of the Reconstruction Finance Corporation Liquidation Act as amended to June 29, 1954. If this is true, then under the terms of section 105 this action would be abated unless Monolith moved to substitute the Administrator in place of R. F. C. within twelve months of June 30, 1957. The motion was not made within this twelve-month period, but was made on March 2, 1959, after the motion to dismiss this action had been filed.

Appellant contends, however, that the abolition of R. F. C. by virtue of section 6 of Reorganization Plan No. 1 of 1957 was not the "dissolution" referred to in section 105 of the Reconstruction Finance Corporation Liquidation Act as amended to June 29, 1954. Hence, it is argued, such abolishment did not bring into play the requirement of section 105 that in order to avoid abatement of a pending action against R. F. C. a motion to substitute parties must be made within twelve months after dissolution of R. F. C. It is further urged that until there has been a dissolution of the kind referred to in section 105 there is no possibility of abatement and therefore no occasion to utilize the procedure prescribed in that section for avoiding abatement.

In evaluating these conflicting points of view we start with the basic premise that in the absence of statute an action by or against a corporation abates when the

corporation goes out of existence.[9] It follows that if R. F. C. had gone out of existence between June 16, 1950, when this action was begun, and July 30, 1953, when the Reconstruction Finance Corporation Liquidation Act of that year was passed, the action would have immediately abated. This is true because until this 1953 statute was enacted there was no statutory procedure whereby abatement could have been avoided.[10] But R. F. C. did not go out of existence during this period.

If the succession of R. F. C. had been terminated between July 30, 1953, when the Reconstruction Finance Corporation Liquidation Act of that year was passed, and June 29, 1954, when the similar act of 1954 was passed, a procedure for avoiding abatement would have been available. The procedure there provided for is the same as that provided for in section 105 of the 1954 act, quoted in footnote 8, except that the 1953 procedure refers to

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[9] Defense Supplies Corporation v. Lawrence Warehouse Co., 336 U. S. 631, 634-635; Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 259; Chairman of U. S. Maritime Commission v. California Eastern Line, Inc., D.C.Cir., 204 F.2d 398, 400.

[10] It is true that § 9(b) of the Reorganization Act of 1949, 63 Stat. 206, 5 U.S.C.A. Cum. Supp. § 1332-7(b) provides a procedure for avoiding the abatement of actions against the head of any agency or other officer of the United States in his official capacity or in relation to the discharge of his official duties by reason of the taking effect of any reorganization plan authorized by that act. It is also true that on May 1, 1951, Reorganization Plan No. 1 of 1954, prepared and effectuated pursuant to the 1949 act, became effective. 65 Stat. 773, 15 U.S.C.A. § 601, 1959 Supp. p. 28.

But since the present action does not purport to be against the head or other officer of R.F.C., but is against the agency itself, the provision of § 9(b) of the Reorganization Act of 1949 for avoiding abatement would appear to be inapplicable to the present action. As will later appear, however, the result is the same whether or not the procedures for avoiding abatement as set out in § 9(b) of the 1949 act are deemed applicable here.

"termination of succession" instead of "dissolution." But the succession of R. F. C. was not terminated during that period.

If R. F. C. had been dissolved between June 29, 1954, when the Reconstruction Finance Corporation Liquidation Act of that year was passed, and June 30, 1957, when Reorganization Plan No. 1 of 1957 became effective, abatement of this action could have been avoided by following the procedure set out in section 105 of the 1954 act, quoted above. But R. F. C. was not dissolved during that period.

On June 30, 1957, R. F. C. was "abolished" by operation of section 6 of Reorganization Plan No. 1 of 1957, which became effective on that day. The corporation therefore went out of existence on that day unless in addition to being "abolished" R. F. C. had to be, but was not, "dissolved" as that term is used in section 3(a) of the R. F. C. Act, as amended to June 29, 1954, before it could go out of existence.

Under section 3(a) of the R. F. C. Act, as amended to June 29, 1954, the corporation had "succession until it is dissolved pursuant to the provisions of section 10 of this act." Under section 10, quoted in footnote 6, R. F. C. would not be dissolved until the Secretary of the Treasury had done five things: (1) Found that liquidation would no longer be advantageous to the United States; (2) found that all of the corporation's legal obligations had been provided for; (3) retired any capital stock then outstanding; (4) paid into the Treasury as miscellaneous receipts the unused balance of the moneys belonging to the corporation; and (5) made a final report to the Congress.

In the 1957 Reorganization Plan each of these five steps was provided for. Instead of requiring that the Secretary of the Treasury find that liquidation would no longer be advantageous to the United States, the President and Congress in effect made that finding themselves by transferring all of R. F. C.'s functions, assets and liabilities elsewhere, and abolishing the corporation. Instead of requiring that the Secretary of the Treasury find that all of the corporation's legal obligations had been provided for, the President and Congress expressly provided for such obligations in the 1957 Plan.

Under section 6(b) of the 1957 Plan the Secretary of the Treasury was expressly given the same duties as specified in steps (3) and (4) of the section 10 dissolution procedure referred to above. Fulfillment of these duties, however, was not made a condition of dissolution, termination of succession, or abolition of R. F. C. Abolishment of the corporation, provided for in section 6(a) of the 1957 Plan, was not made subject to any conditions whatsoever.

Under section 6(c) of that plan, the Secretary of the Treasury was given the duty of making a report to Congress "not later than June 30, 1959." Section 6(c) of the 1957 Plan further provides that the "function of making the final report provided for in the said section 10 is hereby abolished."

It follows from what has just been said that the provisions for dissolution of R. F. C., as set out in section 10 of the R. F. C. Act, were completely superseded by the provisions of Reorganization Plan No. 1 of 1957. From that time on R. F. C. in order to become nonexistent did not have to be "dissolved" under section 10 in addition to being "abolished" under the 1957 Plan

We therefore conclude that R. F. C. went out of existence on June 30, 1957, on which date the provisions of section 10 of the R. F. C. Act, relating to dissolution of the corporation, were no longer effective. Under the common-law rule to which reference has been made this action abated on that day unless there was then in effect a statute providing procedure for avoiding abatement of the action, and such procedure was followed.

In our opinion such procedure was provided by section 105 of the Reconstruction Finance Corporation Liquidation Act, as amended to June 29, 1954. It is true that the procedure set out in that section, which is quoted earlier in this opinion, refers to abatement "by reason of the dissolution of the Corporation." It is also true, as we have stated above, that dissolution as provided for in section 10 of the R. F. C. Act has never taken place because that section has been superseded by the provisions of the 1957 Reorganization Plan. In our view, however, the abolishment accomplished by the latter plan was also a "dissolution" within the meaning of section 105.

The latter section is not a part of the R. F. C. Act and was therefore not necessarily superseded by the provisions of the 1957 Plan which relates only to the latter act. The 1957 Plan did not expressly repeal section 105, and a repeal by implication is precluded.[11]

The word "abolish" was used in Reorganization Plan No. 1 of 1957 because the plan was promulgated under authority of the Reorganization Act of 1949, and that act uses the word "abolish." The latter act applies not only to government corporations, but also to executive

[11] See § 9(a)(1)-(5) of Reorganization Act of 1949, 63 Stat. 205, 5 U.S.C.A. Cum. Supp. § 1332-7(a)(1)-(5).

departments, commissions, councils and the like. The term "dissolve" would have been inappropriate with reference to such departments and agencies and so the broader term "abolish" was used. But it cannot be doubted that unless the term "dissolved" is used in some special sense in section 105 a corporation which is abolished is also dissolved. In either event its succession is terminated. Moreover, all of the steps prescribed by section 10 of the R. F. C. Act are also required by the 1957 Plan.

To hold otherwise than here indicated is to assume that the President and Congress in effectuating the 1957 Plan desired to abandon the previous policy of providing a method of avoiding the abatement of actions upon the termination of succession by R. F. C. There is nothing in that plan or elsewhere in the statutes or legislative history to indicate any such purpose.

But while the procedures pertaining to the avoidance of abatement as provided for in section 105 were available to prevent the abatement of this action after the abolishment of R. F. C. on June 30, 1957, they were not utilized. The action therefore abated on June 30, 1958, when the period of taking advantage of those procedures expired, unless for one of the other reasons urged by appellant this result does not follow. See Defense Supplies Corporation v. Lawrence Warehouse Co., 336 U. S. 631.

Monolith argues that abatement was forestalled by reason of provisions of the statutes of California, or of the Code of the District of Columbia, or of Rule 25(c), Federal Rules of Civil Procedure, 28 U. S. C. A., which, it is asserted, provide procedures for substitution of the Administrator for R. F. C. While there are a number of reasons why this contention is without merit, it is suf-

ficient to say that since Congress provided by section 105 a specific procedure to be followed any contrary provisions of the statutes, code, or rules referred to are inapplicable.

Monolith also urges that the 1957 Plan was intended to accomplish an automatic substitution of parties, thus making it unnecessary to follow the procedure set out in section 105. In this connection reference is made to portions of the message of President Eisenhower in transmitting this plan to Congress, 1957 U. S. Code Cong. & Admin. News, pp. 951-952.[12] In this message it is recited that the plan transfers the pertinent assets of the corporation to the respective agencies together with the related liabilities, "and by operation of law substitutes the particular transferee for the corporation with respect to all the instruments of every kind and character pertaining to the transferred functions, assets, and liabilities."

As R. F. C. points out, the quoted words do not say that the transferees are substituted as parties to existing lawsuits. Read in context, they refer to the transfer

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[12]The portion relied upon by appellant is shown in italics.

"The Plan also transfers the pertinent assets of the Corporation to the respective agencies, together with the related liabilities, *and by operation of law substitutes the particular transferee for the Corporation* with respect to all instruments of every kind and character pertaining to the transferred functions, assets, and liabilities. In order to permit the transferees to administer the transferred matters with the same flexibility of operation as obtains at present, the plan transfers to each transferee those powers, authority, rights and immunities which are now available or applicable to the Corporation for carrying out the respective functions. *To the extent that it becomes necessary or desirable, therefore, the transferees will be enabled, with respect to the transferred functions, to sue and be sued*, to engage private attorneys in conjunction with litigation involving the transferred functions. . . ."

of assets and liabilities as provided in section 3 of the plan. The automatic substitution, according to the President's message, is with respect to the "instruments" pertaining to the transferred functions, assets and liabilities. By no reasonable inference could this include lawsuits.

It is also stated in this message that "the transferees will be enabled, with respect to the transferred functions, to sue and be sued. . . ." It is not stated in this or any other part of the message, however, that there are no procedures to be followed in taking advantage of the preserved right to sue the transferee. Had this been the intention one would expect to find in the 1957 Plan some provision explicitly so providing.

Not only is such a provision lacking, but section 105 of the Reconstruction Finance Corporation Liquidation Act prescribing a procedure to be followed was left intact. If appellant had followed the procedure prescribed by that section it would have been able to maintain this suit against the Administrator of General Services, the transferee in this case.

Monolith earnestly contends that under the facts of this case R. F. C. is estopped to attack Monolith's failure to move for substitution within the year allowed by section 105. The statute in question did not allow the officers and attorneys of R. F. C. to extend the time. This being so, their failure to advise Monolith that time was running out could not work an estoppel.[13]

Monolith asserts that a line of cases arising during the administration of the Office of Price Administration and

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[13] See Snyder v. Buck, 340 U. S. 15, 19; Poindexter v. Folsom, 3 Cir., 242 F.2d 510. See, also, United States v. Jones, 9 Cir., 176 F.2d 278, 281.

certain other cases establish the rule that where the United States is the real party in interest tardy substitution is allowed. It is Monolith's contention that this is such a case. All but two of the cases cited in support of this argument were decided prior to the Lawrence Warehouse Co. case, *supra*. The Seventh Circuit, relying on the latter case, refused to follow these earlier cases. Bowles v. Wilks, 7 Cir. 175 F. 2d 35. The Supreme Court later reached the same result in Snyder v. Buck, 340 U. S. 15. In the two cases subsequent to the Lawrence Warehouse Co. case[14] relied upon by Monolith the substitution was timely. We find this contention to be without merit.

Monolith contends in effect that the nature of this action is for just compensation for taking under the Fifth Amendment. But this contention was in effect determined adversely to Monolith on the prior appeal. Monolith Portland Midwest Company v. R. F. C., 9 Cir., 240 F. 2d 444. Termination of the contract pursuant to the Contract Settlement Act of 1944 frustrated Monolith in obtaining anticipated profits and advantages therefrom. But, as the Supreme Court said in Omnia Commercial Co., Inc. v. United States, 261 U. S. 502, 513, "Frustration and appropriation are essentially different things." There was here no taking of Monolith's property which entitled the company to just compensation under the Fifth Amendment.[15]

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[14]Fleming v. Mohawk Wrecking and Lumber Co., 331 U. S. 111; United States v. Allied Oil Corporation, 341 U. S. 1.

[15]See, in addition to Omnia Commercial Co., Inc. v. United States, *supra*, United States v. Grand River Dam Authority, U. S. , decided June 13, 1960, and cases there cited; Lichter v. The United States, 334 U. S. 742.

Moreover, even if the principle of just compensation is involved, it still must be established that the United States has consented to be sued for the recovery of such compensation. The United States may withhold, withdraw, or condition that consent any way it chooses. Laycock v. United States, 9 Cir., 230 F. 2d 848, 850. Here the United States had conditioned such consent upon compliance with the procedure prescribed in section 105. That procedure has not been followed.

There has been no lack of due process, and the procedures prescribed are not constitutionally void for vagueness. The 1957 Reorganization Plan very plainly superseded the dissolution procedure of section 10 of the R. F. C. Act. It also retained in effect, but with respect to the dissolution accomplished by section 6 of the 1957 Plan, the procedures prescribed in section 105 whereby abatement could be avoided. But if it did not retain those procedures in effect, there were no procedures which could be used in avoiding abatement. Therefore, whether or not the 1957 Plan retained in effect the procedure prescribed in section 105, this action has abated.

Affirmed.

(Endorsed) Opinion Filed July 27, 1960.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit.

Monolith Portland Midwest Company, a corporation, Appellant, v. Reconstruction Corporation, a corporation, Appellee.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came to be heard on the Transcript of record from the United States District Court for the Southern District of California, Central Division, and on suggestion of abatement and motion to dismiss appeal, and was duly submitted:

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment

Filed and entered: July 27, 1960.

FRANK H. SCHMID, Clerk

APPENDIX "B."

Statutes Involved

1. Reconstruction Finance Corporation Act of January 22, 1932, as amended June 30, 1947 (c. 166, 61 Stat. 202, 208, May 25, 1948, c. 334 § 3, 62 Stat. 362).

The original RFC Act, as amended to May 25, 1948, provided: (1) that RFC "shall have succession through June 30, 1956, unless it is sooner dissolved by an Act of Congress . . ." (15 U.S.C.A. 603); (2) for liquidation of the Corporation by the board of directors (15 U.S.C.A. 608); or (3) liquidation by the Secretary of the Treasury if at the "expiration of succession of the Corporation, its board of directors have not completed the liquidation of its assets and the winding up of its affairs." (15 U.S.C.A. 609).

Following the RFC Liquidation Act of July 30, 1953 ("5" below) and the RFC Act of 1954 ("6" below), Section 10 of the RFC Act (15 U.S.C.A. 609) read as follows:

> "If by the close of business on June 30, 1954, its board of directors shall not have completed the liquidation of its assets and the winding up of its affairs, the duty of completing such liquidation and winding up of its affairs shall be transferred to the Secretary of the Treasury, who for such purpose shall succeed to all the powers and duties of the board of directors under this chapter. In such event he may assign to any officer or officers of the United States in the Treasury Department the exercise and performance, under his general supervision and direction, of any such powers and duties. When the Secretary of the Treasury shall find that such

liquidation will not longer be advantageous to the United States and that all of the Corporation's legal obligations have been provided for, he shall retire any capital stock then outstanding, pay into the Treasury as miscellaneous receipts the unused balance of the moneys belonging to the Corporation, and make a final report to the Congress. Thereupon the Corporation shall be deemed to be dissolved. . . ."

2. Statute Dissolving Defense Plant Corporation and Substituting Reconstruction Finance Corporation. (Joint Resolution, Act June 30, 1945, Ch. 215, 59 Stat. 310).

Joint Resolution

To transfer to the Reconstruction Finance Corporation the functions, powers, duties, and records of certain corporations.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provision of law, all functions, powers, duties and authority of the corporations hereinafter designated, are hereby designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance

Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twleve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945.

Approved, June 30, 1945.

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3. Contract Settlement Act of 1944 (58 Stat. 649, 41 U.S.C.A. §§101 *et seq.*).

An Act to provide for the settlement of claims arising from terminated war contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Objectives of the Act

Section 1. The Congress hereby declares that the objectives of this Act are —

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit:

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement:

* * * *

Sec. 6. (a) It is a policy of the Government, and it shall be the responsibility of the contracting agencies and the Director, to provide war contractors with speedy and fair compensation for the termination of any war contract in accordance with and subject to the provisions of this Act, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the termination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts.

* * * *

Appeal

Sec. 13. (a) Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been

submitted in the manner and substantially the form prescribed under this Act, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contracting agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U.S.C. 41 (20)), except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United States, the suit shall be

brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in this contract or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand,

therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the Appeal Board or court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the Appeal Board or court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c) (1) (ii) of this section, the Appeal Board or court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the Appeal Board or court may prescribe. Unless the case is remanded, the Appeal Board or court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

* * * *

4. War Mobilization and Reconversion Act of 1944 (58 Stat. 785, 50 U.S.C.A. App. §1657).

Title I—Office of War Mobilization and Reconversion

Section 101. (a) There is hereby established the Office of War Mobilization and Reconversion, which shall be headed by the Director of War Mobilization and Reconversion (hereinafter called the "Director").

* * * *

(b) The following agencies shall be placed within the Office of War Mobilization and Reconversion and shall exercise their functions subject to the general supervision of the Director:

(1) Office of Contract Settlement, created by the Contract Settlement Act of 1944.

* * * *

Title II—Demobilization and Reconversion Policies

* * * *

Sec. 202. Any contracting agency shall terminate prime contracts for war production whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war, and shall not continue performance under such contracts merely for the purpose of providing business and employment, or for any purposes other than the prosecution of the war, unless the Office of War Mobilization and Reconversion finds that the continuation of some or all of the work in process under any such contract will benefit the Government or is necessary to avoid substantial physical injury to a plant or property.

5. The Reconstruction Finance Corporation Liquidation Act of 1953 (c. 282, 67 Stat. 231), provides in part as follows:

"Sec. 102. (a) The first sentence of section 3 (a) of the Reconstruction Finance Corporation Act, as amended (15 U.S.C. 603(a)), is amended by striking out 'June 30, 1956' and inserting in lieu thereof 'June 30, 1954.'

"(b) Subsection (f) of section 4 of the Reconstruction Finance Corporation Act, as amended (15 U.S.C. 604(f)), is amended by striking out 'June 30, 1954,' and inserting in lieu thereof 'the sixtieth day after the date of enactment of the Reconstruction Finance Corporation Liquidation Act.'

"(c) Except as otherwise provided in this title, the liquidation of assets and winding up of affairs of the Reconstruction Finance Corporation shall be carried out as expeditiously as possible in accordance with the provisions of sections 9 and 10 of the Reconstruction Finance Corporation Act.

* * * *

"Sec. 105. No suit, action, or other proceeding lawfully commenced by or against the Reconstruction Finance Corporation shall abate by reason of the termination of succession of the Corporation; but the Court may, on motion or supplemental petition filed at any time within twelve months after the date of such termination of succession and showing a necessity for a survival of such suit, action or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the officer or agency of the Government performing

the functions with respect to which any such suit, action, or other proceeding was commenced.

"Sec. 106. (a) Upon the termination of succession of the Reconstruction Finance Corporation the Administrator of the Reconstruction Finance Corporation shall make a full report to the Congress.

"(b) During such period of time as the Secretary of the Treasury shall be engaged in liquidating the assets and winding up the affairs of the Reconstruction Finance Corporation, pursuant to section 10 of the Reconstruction Finance Corporation Act, he shall make quarterly reports to the Congress setting forth the progress of such liquidation and winding up of affairs."

6. Reconstruction Finance Corporation Act of 1954 (c. 410, 68 Stat. 320).

* * * * *

"Sec. 2. (a) Section 10 of the Reconstruction Finance Corporation Act, as amended, is hereby amended by striking therefrom the words 'at the expiration of the succession of the Corporation' and inserting in lieu thereof the words 'by the close of business on June 30, 1954.'

"(b) Subsection (a) of section 102 of the Reconstruction Finance Corporation Liquidation Act is amended to read as follows:

"'(a) The first sentence of section 3(a) of the Reconstruction Finance Corporation Act, as amended (15 U.S.C. 603(a)), is amended to read: "The Corporation shall have succession until it is dissolved pursuant to the provisions of section 10 of this Act."'

"(c) Section 105 of the Reconstruction Finance Corporation Liquidation Act is amended by striking the words 'termination of succession' wherever they appear therein and inserting in lieu thereof the word 'dissolution.'

"(d) Subsection (a) of section 106 of the Reconstruction Finance Corporation Liquidation Act is amended to read as follows:

"'(a) Promptly after June 30, 1954, the Administrator of the Reconstruction Finance Corporation shall make a full report to the Congress.'"

Following the RFC Act of 1954, the RFC Liquidation Act of July 30, 1953 read as follows:

"Sec. 102. (a) The first sentence of section 3 (a) of the Reconstruction Finance Corporation Act as amended (15 U.S.C. 603(a)), is amended to read: 'The Corporation shall have succession until it is dissolved pursuant to the provisions of section 10 of this Act.'

* * * *

"Sec. 105. No suit, action, or other proceeding lawfully commenced by or against the Reconstruction Finance Corporation shall abate by reason of the dissolution of the Corporation; but the Court may, on motion or supplemental petition filed at any time within twelve months after the date of such dissolution and showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the officer or agency of the Government succeeding the functions with respect to which any such suit, action, or other proceeding was commenced.

"Sec. 10. (a) Promptly after June 30, 1954, the Administrator of the Reconstruction Finance Corporation shall make a full report to the Congress."

7. Reorganization Plan No. 1 of 1957, 22 F.R. 4633, 71 Stat. 647 (15 U.S.C.A. 1959 Supp. 604, p. 27).

The Reorganization Plan No. 1 of 1957, effective June 30, 1957, provided as follows:

"Section 1. Definitions. As used in this reorganization plan:

"(a) The term 'Corporation' means the Reconstruction Finance Corporation.

"(b) The term 'remaining functions' means (1) all functions of the Corporation, (2) except as otherwise provided in subsections (b) and (c) of section 6 of this reorganization plan, all functions of the Secretary of the Treasury under section 10 of the Reconstruction Finance Corporation Act, as amended (15 U.S.C.A. 609) [section 609 of this title], and (3) all functions of the Secretary of the Treasury under sections 102 and 108 (b) of the Reconstruction Finance Corporation Liquidation Act, (67 Stat. 230, 231), as amended [sections 603 and 607 note of this title].

"(c) The term 'transferee' means the Housing and Home Finance Administrator, the Administrator of General Services, the Administrator of the Small Business Administration, and the Secretary of the Treasury.

"Sec. 2. Transfer of functions.

* * * *

[illegible] pursuant to Executive [illegible] 1947 (12 F.R. [illegible] and Section 201 of Public Law 132—80th Congress (61 Stat. 209), [illegible] and terminations of functions with respect to which duties of the Corporation were transferred pursuant to the provisions of Title II of Public Law 860—80th Congress (62 Stat. 1147), and (3) activities of the RFC Liquidation Board and the functions transferred to the Corporation by Executive Order No. 9841 of April 23, 1947 (12 F.R. 2645) [set out as note under section 601 of Appendix to Title 50].

* * * * *

(c) There are hereby transferred to the Secretary of the Treasury all functions of the Corporation not otherwise transferred by the provisions of the reorganization plan, all [illegible]

* * * *

(d) The foregoing transfers include the transfer to each such officer, for use in exercising his functions hereunder, of the powers, duties, [illegible]

crued interest thereon, and property acquired in connection therewith, and the liabilities, contracts, bonds, mortgages, notes and other instruments relating thereto are hereby transferred from the Corporation to the respective transferees.

"Sec. 4. * * *

"Sec. 5. * * *

"Sec. 6. Abolition of the Corporation. (a) The Corporation is hereby abolished.

"(b) The Secretary of the Treasury shall retire the capital stock of the Corporation and, subject to the provisions of section 4 hereof, shall pay into the Treasury, as miscellaneous receipts, all unused funds of the Corporation.

"(c) Not later than June 30, 1950, the Secretary of the Treasury shall transmit a report to the Congress, which report (1) shall cover the affairs of the Corporation up to the time of the taking effect of the provisions of this reorganization plan, and (2) shall correspond to the final report required by section 10 of the Reconstruction Finance Corporation Act, as amended (15 U.S.C. 606) [section 606 of this title]. The function of making the final report provided for in the said section 10 [section 606 of this title] is hereby abolished.

"Sec. 7. Effective date. The provisions of this reorganization plan shall take effect at the time [to be determined under the provisions of section 6 of the Reorganization Act of 1949, as amended [section 133z-4 of Title 5], or at the close of June 30, 1957, whichever is later."

8. Section 5401 of the California Corporations Code provides:

"No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for dissolution and winding up thereof."

9. The Code of the District of Columbia relating to the effect of corporate dissolution is as follows:

"§ 29-710 [5:406]. Actions not to abate—judgments.

No action pending in favor of or against any corporation shall be discontinued or abate by the dissolution of the corporation, whether such dissolution occur by the expiration of its charter or otherwise, but all such actions may be prosecuted to final judgment in its corporate name; and on all judgments so obtained, whether before or after its dissolution, execution may be had and satisfaction enforced in such corporate name. (Mar. 3, 1901, 31 Stat. 1319, ch. 854 § 783)".

"§ 29-931: Survival of Remedy after dissolution.

The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the commissioners, or (2) by proclamation of the commissioners for failure to pay annual report fees or file annual reports as provided in the chapter, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, or any right or claim existing, or any liability incurred [illegible] such dissolution. Any suit or proceeding by or against the corporation may be [illegible]uted or de

fended by the corporation in its corporate name. The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration." (June 8, 1954, 68 Stat., 219, ch. 269, § 97, effective Dec. 5, 1954)"

10. Wyoming Compiled Statutes, 1945, Section 44-1103:

"*Dissolution shall not abate actions.* — No suit or action whereto any corporation is or may be a party, shall abate by reason of the dissolution of such corporation by expiration of its charter of incorporation or otherwise; but the trustees or directors of such corporation, acting as trustees to the stockholders and creditors after the dissolution as herein provided, or the survivors of them, or the trustee or trustees, receiver or receivers, appointed by the decree of any court of competent jurisdiction, may prosecute or defend such suit or action in the name of the corporation dissolved, notwithstanding the dissolution."

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No. 489

In the Supreme Court of the United States

OCTOBER TERM, 1960

MONOLITH PORTLAND MIDWEST COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
ROBERT E. POWELL,
Attorneys,
Department of Justice, Washington 25, D.C.

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an action brought by petitioner against the Reconstruction Finance Corporation for damages for the termination of a contract with petitioner. After earlier proceedings, the case was, on November 18, 1957, remanded by the court of appeals for retrial before a jury. On January 19, 1959, while the case was still pending for trial, the Administrator of the General Services Administration, to whom the relevant functions of the RFC had been transferred, appeared specially and moved to dismiss the action on the ground that the RFC had been abolished on June 30, 1957, and the action had abated upon the failure of petitioner to substitute the GSA Administrator as de-

fendant within the one-year period for substitution allowed by § 105 of the RFC Liquidation Act of 1953, 67 Stat. 230, as amended by 68 Stat. 320. The district court dismissed the action and the court of appeals affirmed. The sole question presented here is whether the action abated.

As amended to June 29, 1954, the RFC Act of 1932 provided that the RFC would be "dissolved" upon the completion of a series of enumerated steps (§ 10, 15 U.S.C. 609, Pet. App. 16–17). Section 105 of the RFC Liquidation Act[1] provided that no pending action against the RFC "shall abate by reason of the dissolution of the Corporation; but the Court may, on motion * * * filed at any time within twelve months after the date of such dissolution * * * allow the same to be maintained by or against the officer or agency" to whom the relevant functions were transferred (here, the GSA Administrator) (Pet. App. 26).

By June 30, 1957, the procedure for dissolution provided for by the amended RFC Act had not yet been accomplished. On that date, however, that procedure was superseded by Reorganization Plan No. 1 of 1957 (22 F.R. 4633, 71 Stat. 647, 15 U.S.C. 601, note), which declared that the RFC "is hereby abolished" (§ 6, Pet. App. 29) and transferred its relevant functions to the GSA (§ 2(b), Pet. App. 28).

It is acknowledged by petitioner that, in the absence of some statutory provision continuing the RFC's life for purposes of litigation or providing for substitu-

[1] Other sections of that Act had amended the dissolution provisions of the RFC Act.

tion, actions against it would abate upon the termination of its existence. See *Defense Supplies Corporation* v. *Lawrence Warehouse Co.*, 336 U.S. 631, 634–636. Nor does petitioner seriously deny that, if § 105 of the Liquidation Act is the controlling provision, the action abated upon its failure to substitute the GSA Administrator before June 30, 1958.[2] Petitioner's argument is rather that (1), since § 105 referred to "dissolution", it was applicable only to "dissolution" as provided for in the amended RFC Act and not to the "abolishment" decreed by the subsequent Reorganization Plan; and (2), there being no applicable federal statute, state law (under which the action would allegedly not abate) governs.

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[2] The petition apparently does preserve, though without elaboration of the facts, a contention that the Government was "estopped" to assert abatement (Pet. 7, 15), but that claim, rejected by the district court on the merits (R. 397, 398), is plainly insubstantial. The claim is based upon correspondence between petitioner's counsel and Government representatives during 1955 and early 1956, long before the RFC was abolished. The first letter (January 1955) erroneously assumed that the RFC had been dissolved on June 30, 1954, and asked who should be substituted, in response to which petitioner was correctly informed that the RFC had not yet been dissolved and hence that no substitution was appropriate (R. 348–350). The other correspondence, the last of which was dated April 6, 1956, consisted simply of requests for, and the furnishing of, information as to the progress of the liquidation of the RFC (R. 351–357; 363–365). It is not claimed that any of the information furnished was erroneous or misleading, and the theory of estoppel on which petitioner relies is difficult to comprehend. In any event, as the court of appeals held, theories of estoppel cannot prevent abatement for failure to make a timely substitution. *Snyder* v. *Buck*, 340 U.S. 15, 19; *Poindexter* v. *Folsom*, 242 F. 2d 516 (C.A. 8).

Both contentions are unsound. The RFC was a federally-created entity all of whose functions and powers were defined by Act of Congress, and it is by federal law, not state law, that its juridical status and capacity to be sued must be determined. If no federal statute continued its existence for purposes of litigation after it was "abolished", the result would be, not resort to state law, but the *immediate* abatement of actions against it. However, as shown by the court of appeals' careful analysis of the several statutes, there is no possible reason to read the Reorganization Plan's use of the word "abolished" rather than "dissolved" as intended to make the twelve-month substitution period allowed by § 105 of the Liquidation Act inapplicable.[3] That section fully applied and provided the exclusive authority for substitution. The case is therefore controlled by this Court's decision in *Defense Supplies Corporation* v. *Lawrence Warehouse Co., supra,* holding an action against the Defense Supplies Corporation to be abated upon a failure to substitute its successor within the period allowed by a statute virtually identical in terms to § 105.

The decision is correct, there is no conflict, and to our knowledge there are no other cases pending in-

[3] As the court of appeals pointed out (Pet. App. 9–10), the Reorganization Plan, in using the term "abolished", simply followed the language of the Reorganization Act of 1949 (5 U.S.C. 133z), where the broader term was needed to encompass the elimination of executive agencies as well as the "dissolution" of government corporations.

volving questions of substitution for the RFC. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
ROBERT E. POWELL,
Attorneys.

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